National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 18, 1995

TO: Rik D. Lineback, Acting Regional Director, Region 25

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Lark Electric Company, Inc., Case 25-CA-23783, and, IBEW Local 1701 (Lark Electric Company, Inc.), Case 25-CB-7568

378-4284-9900, 378-4284-9900, 378-4284-9900, 524-5079-2819, 536-2514-0100, 596-3212-9100, 625-3317-0600, 625-3350-8100

This case was submitted for advice on the following issues: Lark Electric Company, Inc. and IBEW Local 1701 (Lark Electric Company, Inc.), Cases 25-CA-23583, 25-CB-7568 (1) Whether the maintenance of a provision in a joint union-employer apprenticeship agreement which waives the normal entrance requirements for persons who sign a union authorization card during an organizing campaign, wherein a majority of employees have signed authorization cards, violates Section 8(b)(1)(A); and (2) whether the Employer violated Section 8(a)(1) and (3) by removing eight economic strikers from a preferential rehire list on the grounds that they had obtained substantially equivalent employment.

FACTS

1. Background

Lark Electric Company, Inc. (Employer) is an electrical contractor located in Owensboro, Kentucky. Since September, 1993, IBEW Local 1701 (Union) has been attempting to organize employees of the Employer. Based on a petition filed by the Union in Case 25-RC-9304, the Region conducted a representation election on October 27, 1993. The tally of ballots indicated 8 of the 14 eligibles cast votes for, and 6 against, the Union.

Thereupon, the Employer filed objections to the election as well as Section 8(b)(1)(A) charges in Cases 25-CB-7389 and 25-CB-7491 based inter alia, on the Union's pre-election promises to the Employer's employees that if they and a majority of their colleagues signed union authorization cards prior to the election, then they would be automatically admitted into the Union and, based on their experience, treated either as a journeymen or enrolled as an apprentice in the Joint Apprenticeship Training Program ("JATP") run by the Union in conjunction with the National Electrical Contractors Association ("NECA").

Based on its investigation, the Region issued an amended consolidated complaint, dated July 22, 1994, which read in pertinent part:

5. (a) About September 1, 1993 [the Union] (i) promised employees that if they signed recognition cards prior to a representation election, they could join the Union and become a journeyman or enter the apprenticeship program, without having to otherwise meet the [Union's] entrance requirements in Section V(1) of the Local Apprenticeship and Training Standards for the Electrical Contracting Industry, even if the [Union] did not reach a collective-bargaining agreement with the Employer;

(ii) Promised employees that if they signed authorization cards prior to a representation election, they could join the Union and become a journeyman or enter the apprenticeship program, without having to otherwise meet the [Union's] entrance requirements in Section V(1) of the Local Apprenticeship and Training Standards for the Electrical Contracting Industry, even if the [Union] was not selected as the employees' collective bargaining representative;

(b). About September 29, 1993, [the Union] promised employees that if they signed authorization cards prior to a

representation election, they could join the Union and become a journeyman or enter the apprenticeship program, without having to otherwise meet the [Union's] entrance requirements in Section V(1) of the Local Apprenticeship and Training Standards for the Electrical Contracting Industry, even if the [Union] did not reach a collective-bargaining agreement with the Employer;

(c) About November 22, 1993, [the Union] granted entrance to its apprenticeship program, without having to otherwise meet the [Union's] entrance requirements in Section V(1) of the Local Apprenticeship and Training Standards for the Electrical Contracting Industry, to employees who signed authorization cards prior to a representation election.

(d) the benefits promised employees as described above in paragraphs 5(a) and 5(b) and granted to employees as described above in paragraph 5(c) were available only to those employees who signed Union authorization cards prior to a representation election.

By letter dated August 3, 1994 to the Region, Employer counsel said:

The provision under which the employees gained entry into the apprenticeship program should be declared unlawful and the employees removed from the apprenticeship program.

On August 31, 1994 the Region approved a unilateral settlement over the Employer's objections. In the Notice to the settlement, the Union undertook as follows:

WE WILL NOT tell employees that if they sign authorization cards in advance of a representation election, we will offer them membership to the Union as journeymen or with [sic] acceptance into the apprenticeship program.

WE WILL NOT grant acceptance into the apprenticeship program to employees only because they signed authorization cards in advance of a representation election.

The settlement also contains an attachment with the following clause:

The parties hereto stipulate that this Settlement Agreement constitutes a settlement of only those unfair labor practices specifically set forth in the Complaint in Cases 25-CB-7389, 25-CB-7491, and does not settle or otherwise constitute a bar to further proceedings on any other unfair labor practices upon which charges have been or may be timely filed, whether or not the events giving rise to such charges took place before or after this Settlement Agreement. The parties further stipulate that this Settlement Agreement does not preclude the use of evidence supporting the allegations settled herein as background evidence in proceedings on any other charge of unfair labor practice.

The Charged Party agrees that this settlement agreement does not constitute and shall not be used as evidence in proceeding to support a claim that the Charged Party has prevailed herein...

Thereupon, the Employer filed an appeal with the Office of Appeals, in which it reiterated its contentions that union grants of benefits are as unlawful as employer grants of benefits, and that the provision under which the employees gained entry into the apprenticeship program should be declared unlawful and the employees should be removed from the apprenticeship program. However, by letter dated November 22, 1994, the Office of Appeals denied the appeal. It said, inter alia, that

As to your allegation that the Settlement Agreement should declare Section V(3) of the apprenticeship program as unlawful, it was noted that this issue is the subject of the charge in Case 25-CB-7568 and will be resolved in that case.

2. The clauses in issue

Section V of the Joint Apprenticeship Training Program ("JATP") sets the following "Qualifications for Apprenticeship":

(1) ...To qualify for oral interview, an applicant must meet the following basic requirements unless he or she has a minimum of six thousand hours of substantiated electrical construction work experience. A. Must be at least 18 years of age. B. Must be a

high school graduate or have a GED. C. Minimum math - must have completed one full year of high school algebra with a passing grade or one post high school algebra course with a passing grade. D. Must have a qualifying score on the S-72R77 aptitude test or a qualifying percentile on the GATB... as prescribed by the Committee. E. Must present or sign a statement that he or she is physically able to perform electrical construction work.... F. Must provide official transcript or transcripts for high school or post high school showing courses and grades.

(2) A employee, of a nonsignatory employer, not qualifying as a journeyman when the employer becomes signatory shall be evaluated by the JATC and indentured at the appropriate period of apprenticeship based on previous work experience and related training.

(3) An individual who signs an authorization card during an organizing effort wherein over fifty percent of the employees have signed: Whether or not the employer becomes signatory, an individual not qualifying as journeyman shall be evaluated by the JATC and indentured at the appropriate period of apprenticeship based on previous work experience and related training.

C. The instant cases

The charge in Case 25-CB-7568 alleges that the Union, through its agent the Joint Apprentice Committee, has maintained an unlawful apprenticeship program by reason of Section V(3) of the JATP document, and seeks expunction of the clause. The charge in Case 25-CA-23583 alleges that the Employer refused to reinstate certain strikers. As to the latter charge, in early 1994 the Employer laid off certain sympathy strikers. In March 1994, the Union made an unconditional offer on behalf of nine of the strikers to return to work. In August 1994, the Employer informed the strikers that inasmuch as they were working at higher wages, they had achieved substantially equivalent employment elsewhere and were ineligible for reinstatement. After an exchange of letters, in which the strikers protested the removal of their names from the reinstatement list, the Employer removed their names from the list.

ACTION

We concluded that the charge in Case 25-CB-7568 should be dismissed, absent withdrawal. However, complaint should issue, absent settlement, in Case 25-CA-23583, alleging that the Employer unlawfully removed strikers' names from the reinstatement list.

1. Case 25-CB-7568

In NLRB v. Savair, 414 U.S. 270 (1973), the Court found that the union had interfered with the results of an election by offering to reduce initiation fees, but only for those employees who joined the union before the election. The Court reasoned that (1) the practice tended to buy employee support for the union and to paint a false picture of the union's strength, and (2) employees would reasonably fear union retaliation against them should they not join the union and the union nevertheless were selected as the majority representative. Shortly after the Supreme Court's Savair decision, the Board held that a union could, during an election campaign, lawfully offer union membership at a reduced rate where the union stated at the same time that the offer was available to all employees, and that the offer would be available after the election. Endless Mold, Inc., 210 NLRB 159 (1974).[(1)]

In Teamsters Local 240 (Gregg Industries), 274 NLRB 603 (1985), the Board held that union conduct similar to the union conduct in Savair violated Section 8(b)(1)(A). The Board majority[(2)] concluded that a union's preelection conduct should be judged based on the same Savair standard, regardless of whether the conduct is the subject of an election objection or of a Section 8(b)(1)(A) charge.

More recently, in NTA Graphics, 303 NLRB 801, 803, fn. 14, (1991),[(3)] the Board held that a union did not interfere with the results of the election where it paid "sacrifice benefits" to employees who had joined the union and then had been unlawfully terminated by the employer. The Board reasoned that the "payments here were not gifts, but instead were a normal incident of union membership." The Board also distinguished its decision in Mailing Services.[(4)] The Board said that:

Nothing in Mailing Services should be interpreted as indicating that a union will be found to have interfered with an election merely by providing to its new members, even during the critical period, benefits to which they would normally be entitled by virtue of their union membership.

The foregoing cases indicate that even during an organizational campaign, a union is free to grant new members the normal incidents of union membership, and to grant them to the members on the date they join, provided that the offer does not close on the date of the election.

Turning to the instant case, Section V(2) of the JATP offers employees of new signatory employers placement in the apprenticeship program, while Section V(3) offers those employees placement in the apprenticeship program even if the employer does not ultimately become a signatory, provided (a) the employee has signed an authorization card "during an organizing effort" and (b) a majority of the unit employees have signed such a card. The complaint in Case 25-CB-7389 and 25-CB-7491 alleges that the Union promised employees that if they signed authorization cards only prior to the representation election but not thereafter, they would be permitted to join the Union and enter the apprenticeship program without having to otherwise meet the program's entrance requirements, even if the Union were not selected as the bargaining representative and/or even if no agreement were reached, and that the Union then permitted some employees to do just that.

Although the Union's preelection statements were alleged to have violated the Act, we conclude that the language of the JATP is lawful on its face. Section V of the JATP document does not limit admission to the apprenticeship program to those who sign cards and join the Union during the preelection period.[(5)] Thus, if on a date which may be long after the election, an employer ultimately becomes a signatory to a contract with the Union, Section V(2), which grants employees admission to the apprenticeship program when the employer becomes a signatory, controls their rights. Section V(3) comes into play only on the date, even farther in the future, when an employer and the Union reach impasse and/or the employer does not become a signatory. In either case, employees can continue to exercise their right to join the Union and gain admission to the apprenticeship program until a date long after the election. Further, unions routinely continue to organize after they win elections in order to increase their bargaining power. Thus, a union's "organizing effort," in common practice, does not end with the election. In sum, nothing in the text of Section V of the JATP suggests that employees must join the Union before the election to take advantage of the apprenticeship program.[(6)]

Based on the above, the charge in Case 25-CB-7568 should be dismissed, absent withdrawal.[(7)]

2. Case 25-CA-23583

The Employer removed the names of certain sympathy strikers from the reinstatement list on the grounds that they had new jobs at higher wages and hence had achieved substantially equivalent employment elsewhere, despite the statements of the strikers to the Employer that they wished to return to employment with the Employer. In agreement with the Region, we concluded that the sympathy strikers had not achieved substantially equivalent employment and remained eligible for reinstatement.[(8)] Accordingly, the Employer, by removing their names from the reinstatement list, violated Section 8(a)(3).

B.J.K.

---

[1] Endless Mold was an R-case.

[2] Only Chairman Dotson, 274 NLRB 605, fn. 7, was of the view that Section 8(b)(1)(A) was as broad as Section 8(a)(1).

[3] NTA Graphics was in relevant part an R-case.

[4] 293 NLRB 565 (1989). Mailing Services was an R-case in which the Board held that a union interfered with the results of an election by offering and granting to all employees, including nonmembers, immediately prior to the election, free medical screenings. The Board's gloss on Mailing Services states that the "benefits apparently were made available to employees regardless of whether they were union members." 303 NLRB at 803, fn. 14.

[5] The complaint in Cases 25-CB-7389 and 25-CB-7491 did not allege that Section V(3) of the JATP was unlawful on its face, but only that the Union had made unlawful statements promising benefits to employees who joined the Union prior to the representation case election.

[6] The complaint in Cases 25-CB-7389 and 25-CB-7491 alleged in substance that agents of the Union gave employees to believe that they must sign authorization cards before the election to take advantage of the apprenticeship program. Those statements have been remedied by the settlement in those cases. The text of Section V(3) on its face does not state that the offer would expire on the date of the election.

[7] Arguably, on procedural grounds, the processing of this charge would be barred by the settlement in Cases 25-CB-7389 and 25-CB-7491. See Ratliff Trucking Corp., 310 NLRB 1224 (1993). However, in view of our disposition, we do not reach the issue.

[8] Marchese Metal Industries, 313 NLRB 1022, 1028 ff. (1994); Virginia Concrete Co., 316 NLRB 261 (1995).